

## **Wang (Migration) [2020] AATA 4999 (20 November 2020)**

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### **DECISION RECORD**

|                           |                                                                                                     |
|---------------------------|-----------------------------------------------------------------------------------------------------|
| <b>DIVISION:</b>          | Migration & Refugee Division                                                                        |
| <b>APPLICANT:</b>         | Ms Li Wang                                                                                          |
| <b>CASE NUMBER:</b>       | 1831174                                                                                             |
| <b>DIBP REFERENCE(S):</b> | BCC2018/3839669                                                                                     |
| <b>MEMBER:</b>            | Peter Haag                                                                                          |
| <b>DATE:</b>              | 20 November 2020                                                                                    |
| <b>DECISION:</b>          | The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa. |

Statement made on 20 November 2020 at 10:21am

### **CATCHWORDS**

*MIGRATION – Student (Temporary) (Class TU) visa – Subclass 500 (Student) – false or misleading information in visa application – criminal charge not declared – discretion to waive criterion – no response to department’s or tribunal’s requests for information – decision under review affirmed*

### **LEGISLATION**

*Migration Act 1959 (Cth), ss 65, 359(2), 359C, 360(3), 363A*

*Migration Regulations 1994 (Cth), Schedule 2, cl 500.217(1), Schedule 4, criterion 4020*

### **CASE**

*Arora v MIBP [2016] FCAFC 35*

*Batra v MIAC [2013] FCA 274*

*Hasran v MIAC [2010] FCAFC 40*

*Kaur v MIBP [2017] FCAFC 184*

*Plaintiff M64/2015 v MIBP [2015] HCA 50*

*Trivedi v MIBP [2014] FCAFC 42*

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 5 October 2018 to refuse to grant the applicant a Student (Temporary) (Class TU) visa under s.65 of the *Migration Act 1958* (the Act).
5. The applicant applied for the visa on 20 June 2018. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.500.217(1) of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate was not satisfied the applicant meets Public Interest Criteria (PIC) 4020(1) and the requirements of cl.500.217 of Schedule 2 to the Regulations. Further, the delegate was not satisfied waiver of the requirements of PIC 4020 was justified.

### 6. BACKGROUND

7. Pursuant to s.359(2) of the Act, on 21 August 2020 the Tribunal requested the applicant to respond in writing to the issue of whether the applicant gave or caused to be given to the Minister a bogus document; or information that was false or misleading in a material particular in relation to the visa application which is the subject of the review. The applicant was informed that if she failed to respond to the s.359(2) request by 4 September 2020, or within any extended period that was requested and granted within the specified period, she may lose her right to a hearing. The Tribunal is satisfied the s.359(2) request was sent to the applicant's last authorised address for correspondence. The applicant failed to respond to the request, and she did not seek an extension of time. Consequently, the applicant lost her right to a hearing.
8. In these circumstances, s.359C of the Act applies and pursuant to s.360(3) of the Act the review applicant is not entitled to appear before the Tribunal. The effect of s.363A of the Act is that if a review applicant has no entitlement to a hearing, the Tribunal has no power to permit her or him to appear: *Hasran v MIAC* [2010] FCAFC 40.
9. The failure of the applicant to reply to the s.359(2) request for information, and after that request was made to further engage with the Tribunal, indicates the applicant is content for the Tribunal to decide the review on the available information. Consequently, the Tribunal has decided to proceed to a decision without taking further steps to obtain the information.
10. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

### CONSIDERATION OF CLAIMS AND EVIDENCE

11. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.500.217(1) for the grant of the visa. Broadly speaking, this requires that:
  - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and

- the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
  - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
  - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
12. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

**Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?**

13. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
14. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
15. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
16. In this review, one or more of the following criteria may be determinative:
- whether there is evidence before the Tribunal that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth:
    - a 'bogus document', as defined in s.5(1), i.e. a document that the Tribunal reasonably suspects is a document that:
      - purports to have been, but was not, issued in respect of the person, or
      - is counterfeit or has been altered by a person who does not have authority to do so, or

was obtained because of a false or misleading statement, whether or not made knowingly.

and/or

- 'information that is false or misleading in a material particular' as defined in PIC 4020(5), i.e. information that is:

false or misleading at the time it is given, and

relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

17. in relation to the visa application or a visa held in the 12 months before the visa application was made.
18. In this review the applicant provided a copy of the record of the delegate's decision to the Tribunal; the Tribunal has read the decision.
19. According to the delegate's decision, during the course of assessing the visa application an officer of a relevant assessing authority, being the Department of Home Affairs (the Department) caused inquiries to be made into the accuracy of certain information the applicant included in the visa application form she filed with the Department.
20. In the application form the applicant answered "No" to this question: "Has the applicant never been charged with an offence that is currently awaiting legal action?"
21. The enquiries that the officer made disclosed that according to records held by the Queensland Police, the applicant on 23 May 2018 at the Springwood Magistrates' Court in the District of Beenleigh, in the State of Queensland, was charged with engaging in prostitution through unlawful prostitution business. Consequently, the officer of the Department was concerned that the applicant's answer to the foregoing question constituted information that was materially false and misleading in furtherance of her visa application.
22. 22 August 2018 the applicant was invited to respond within 28 days to the accuracy of the information that impugned her answer, and, generally in relation to the officer's concern that the applicant provided materially false and misleading information to the Department in support of her visa application. The applicant did not respond to the invitation.
23. Having regard to the foregoing matters, the Tribunal is satisfied there is evidence before the Tribunal that the applicant gave to the Minister, an officer, or a relevant assessing authority, being the Department, information that is purposefully untrue, and that the impugned information is false or misleading in a material particular as defined in PIC 4020; and, the information is relevant to the criteria the Minister may consider when deciding whether to grant the Student visa pursuant to cl.500.212 of Schedule 2 to the Regulations.
24. All Therefore, the applicant does not meet PIC 4020(1).

**Should the requirements of PIC 4020(1) or (2) be waived?**

25. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the

granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.

26. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
27. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.
28. The officer of the Department in the correspondence sent to the applicant on 22 August 2018, expressly gave to the applicant with an opportunity to make a claim for the waiver of the requirements of PIC 4020.
29. The applicant has not claimed the requirements of PIC 4020 should be waived; and there is no evidence before the Tribunal capable of establishing the existence of compelling circumstances that affect the interests of Australia, or compassionate and compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, that would justify the granting of the visa.
30. Therefore, the requirements of PIC 4020(1) should not be waived.
31. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl.500.217(1).

## **DECISION**

32. The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Peter Haag  
Member

## ATTACHMENT

### Migration Regulations 1994

#### Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
  - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
  - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
  - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
  - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
  - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

## ***Migration Act 1958***

### **s.5 Interpretation**

(1) In this Act, unless contrary intention appears:

...

***bogus document***, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...